No. 222.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

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DAVID WELLS ET AL., PLAINTIFFS IN ERROR,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH ET AL.

BRIEF FOR PLAINTIFFS IN ERROR IN REPLY TO THE BRIEF FOR DEFENDANTS IN ERROR.

JOACHIM R. SAUSSY,
POPE BARROW,
Counsel for Plaintiffs in Error.

(17,669.)

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Supreme Court of the United States

OCTOBER TERM, 1900.

No. 222.

DAVID WELLS, THOMAS BALLANTYNE, ET AL.,
PLAINTIFFS IN ERROR,

vs.

MAYOR AND ALDERMEN OF SAVANNAH AND WADE, CITY MARSHAL, DEFENDANTS IN ERROR.

Brief for the Plaintiffs in Error in Reply to the Brief for Defendants in Error.

In the latter part of the eighteenth century the yearly outgo was found to exceed the yearly income of the city of Savannah, then known as the town of Savannah, by several hundred pounds. The precise amount of the shortage in the year 1790 was seven hundred and eight pounds sterling. It was evident that expenses must be cut down or income must be increased, and the city adopted the latter plan. They decided to dispose of some of the land which belonged to the city known as the common. The ordinance

by which they disposed of it was passed September 28, 1790, and is in the following words:

Ordinance of September 28, 1790.

An ordinance for laying off into lots certain parts of the common appurtenant to the city, and for disposing of the same.

Whereas public utility requires that certain parts of the common be laid out and disposed of:

SECTION 1. *Be it ordained by the mayor and aldermen of the city of Savannah and the hamlets thereof, in council assembled, and it is hereby ordained by the authority of the same,* That all that part of the east and all that part of the west common, situate, and lying between Bay and Broughton streets, extending eastwardly to a public — of one hundred feet in width, and westwardly to a public street of the same width, be, on or before the first day of November next, ensuing, laid off into one hundred and twenty lots; that is to say, eighty lots on the east and forty lots on the west common, each lot to contain sixty feet in width and ninety feet in depth, with certain squares, streets and lanes, in and between the same, agreeably to the plan marked No. 1 (one), hereunto annexed, and being so laid off, the said lots, or as many of them as can be, shall be sold and disposed of on the terms and conditions hereinafter mentioned; that is to say, the said lots shall be valued according to the estimate or schedule marked No. 2 (two), hereunto annexed from one hundred and sixty pounds to forty pounds lawful sterling money, inclusive, and the ground rent of the same shall be in proportion, and after the rate of five pounds per annum on every hundred pounds value, and it shall be in the option of the purchaser either to pay down the said valuation money, or else hold his or her purchase on ground rent, payable quarterly, as hereinafter mentioned.

Sec. 2. *And be it further ordained*, That said lots shall be put up at public auction in arithmetical progression, beginning at number one (1), in each ward, and so proceeding upwards until they shall be all disposed of (except as hereinafter excepted, or until so many of them shall be disposed of as there appear bidders for; and the said lots shall be respectively set up at the valuation contained in said schedule annexed), and whatever sum or sums shall be bid upon the said valuation at the same time of the sale of the said lots shall be considered as increase money and shall be paid down in cash, and the person bidding most of such increase money shall be deemed the purchaser of the lot then under sale; and in regard to the said valuation money, it shall be in the option of the purchasers either to pay the same down in cash, or else to retain the same in their hands and the hands of their heirs and assigns forever, on a ground rent, which ground rent shall be at and after the rate of five pounds, by the year, for every hundred pounds value of the purchase, and so in proportion for any greater or lesser sums, payable in four equal quarterly payments into the city treasury; but it shall, nevertheless, at any time hereafter, be in the power of such purchasers, or their heirs and assigns, to pay in the said valuation money, with what rent may be due up to that time, in full discharge and extinguishment of the said ground rent.

Sec. 3. *And be it further ordained*, That a deed, by way of bargain and sale, shall be made to all and every purchaser or purchasers of the said lots, under the seal of the city, signed by the mayor and a majority of the aldermen for the time being, and attested by the clerk, who shall enter a docket or abstract of such conveyance in a book to be provided and kept for that purpose, and a note or memorandum of such docket or abstract, shall be marked on the said deed. And the said bargain and sale shall vest either an absolute or conditional estate in the pur-

chaser according to circumstances, that is to say, an absolute one, if the valuation money shall be paid down, or a conditional one, if the said valuation money shall not be paid down, this latter also to become absolute if and when the said valuation money shall at any future time be paid into the treasury, and an acknowledgment thereof under the seal of the city, signed by the mayor and a majority of the aldermen for the time being, and attested by the city treasurer, shall be endorsed on such deed. And the said conditional estates shall amount to this, that the use and occupation of the premises are forever secured to the purchaser and others claiming under him or her on payment of the ground rent, but on failure therein for the space of fifteen days after the same shall become due, the said premises are to revert to the corporation, who shall immediately thereafter possess the power of re-entry, and having by means of their proper officers exercised such power and given a notice thereof in writing posted on the premises, the lot or lots so entered upon with all improvements thereon, are to be considered at the expiration of ten days thereafter as absolutely revested in the corporation, and the conditional estate therein determined, to all intents and purposes as fully as if the same had not been bargained for, or purchased, any sale or incumbrance or other act, made or suffered by the purchaser or purchasers or others under him, her or them to the contrary thereof, in anywise notwithstanding.

Sec. 4. *Be it further ordained*, That every purchaser in the class of those taking conditional estates shall at the time of receiving the deed of bargain and sale give bond to the mayor and aldermen of the city of Savannah for the time being with at least one good and sufficient security joined therein to be approved of in the city council in the penal sum of four times the annual ground rent of his or her purchase conditioned for the payment of such rent quarterly during the contin-

uance of said conditional estate without fraud or further delay; and also that in case of re-entry made by the corporation or their officers as aforesaid such purchaser shall and will forfeit and pay on the determination of said conditional estate into the city treasury at the rate of ten per cent. on the valuation money of his or her purchase, if there shall be no building erected thereon to the value of at least twenty pounds sterling; but if there shall be any such building erected thereon to that value, then the same shall excuse the party from said forfeiture of ten per cent. And in all cases the said building shall be appraised and valued by two or three citizens appointed by and sworn before the city council.

SEC. 5. *And be it further ordained*, That all lots from time to time re-entered upon by, and revested in the corporation in the manner before mentioned, within the space of five years from the first sales, shall be sold out again, on the same terms and conditions as the said lots are now directed to be sold and let out, upon a reasonable addition being made to the respective valuations for any buildings or improvements that may be made on said lots, respectively.

Ordinances of Savannah, Henry, p. 80.

Sections 6, 7, and 8 are irrelevant.

It will be seen at a glance that two different so-called "estates" were provided for by this ordinance. One is called an "absolute estate," which was created by the payment of the entire purchase-money and was followed by a deed in fee-simple to the purchaser. This absolute estate was simple and needed no explanation. The other, called a "conditional estate," was complex and involved and needed explanation and definition. This explanation and definition was given in the ordinance, and it is in the plainest words. To prevent the possibility of any mistake

as to their meaning, in the third section of the ordinance they declare:

"And said conditional estates shall amount to this, that the use and occupation of the premises are forever secured to the purchaser and others claiming under him or her on payment of the ground rent."

Two things were clearly settled:

First. The purchaser got nothing but the "use and occupation."

Second. These were "forever secured" to him "on payment of the ground rent."

It is impossible to doubt that they intended a lease by the conditional estates and not a sale.

This is confirmed by section 4 of the ordinance, which requires a bond for four times the annual ground rent, conditioned for the payment of the rent. If a sale had been intended, the bond would have been conditioned for the payment of the purchase-money.

It is true that the word sale occurs in these ordinances, but it clearly refers to the act of putting up the lots at public outcry for renting.

It is equally as clear that the ground-rent lot-holder had only an option to purchase. It is so stated in the ordinances. He had a mere option, and the ordinances call it an option. The following ordinances contain the word option as describing the right to become a purchaser which the ground-rent lot-holder had:

June 19, 1815, Ordinances of Savannah, Henry's Digest, p. 100.

September 28, 1790, Ordinances of Savannah, Henry's Digest, p. 80.

May 30, 1799, Ordinances of Savannah, Henry's Digest, p. 89.

February 3, 1837, Ordinances of Savannah, Henry's Digest, p. 106.

March 14, 1839, Ordinances of Savannah, Henry's Digest, p. 110.

February 11, 1841, Ordinances of Savannah, Henry's Digest, p. 112.

When speaking of the money paid to the city quarterly it was called "ground rent" in terms in the following ordinances:

September 28, 1790, Ordinances of Savannah, Henry's Digest, pp. 80, 81, 82.

May 30, 1799, Ordinances of Savannah, Henry's Digest, p. 89.

April 20, 1801, Ordinances of Savannah, Henry's Digest, p. 92.

June 19, 1815, Ordinances of Savannah, Henry's Digest, p. 100.

February 3, 1837, Henry's Digest, p. 107.

In this latter ordinance is an expression which throws light upon the use of the word "interest" in one or two ordinances in place of ground rent. The language is this:

"The annual ground rent to this corporation equal to the interest on the amount of said residue at the rate of six per centum."

The same expression is used in the ordinances which follow:

March 14, 1839, Ordinances of Savannah, Henry's Digest, p. 110.

February 11, 1841, Ordinances of Savannah, Henry's Digest, p. 112.

In this connection it is well to remember that 5 or 6 per cent. on the valuation placed upon these lots paid as ground rent would give the city a great deal more money than the taxes upon the same amount of property in value. Those who took the absolute estate probably paid in taxes about 1 per cent. Those who took the conditional estate paid as rent five or six pounds, lawful sterling money, on every 100 pounds of valuation. Besides, these ground-rent lot-holders paid taxes on the improvements which were put upon the property, and are still paying them without complaint.

Printed Record, p. 50.

An ordinance passed in 1851 calls this ground rent interest, but it also incorporates in itself the third section of the ordinance of 1801, which is a copy of the third section of the ordinance of 1790.

As late as the year 1851 the city council, in disposing of a strip of land on the north side of Gaston street, which was added to the lots adjoining it, used this language, speaking of the duty of the lot-holder:

"Shall every year, by four equal quarter-yearly payments, pay or cause to be paid into the city treasury of Savannah the additional sum of —— as ground rent for the

use and occupation of the same at the same time and on the same terms as in the original lease of the original lot."

Ordinance July 31, 1851, Ordinances of Savannah, Henry's Digest, 131.

Printed Record, p. 35.

It seems clear that not only the original framers of this ordinance of 1790 understood that the ground-rent lot-holders were tenants and the city was the landlord, but several generations of those who followed them adopted and acted upon the same construction.

From 1790 to 1878, a period of eighty-eight years, no taxes were ever levied upon these ground-rent lots by the city.

Printed Record, pp. 50, 51.

From 1790 until 1878 all the tax ordinances treated them as being exempt from city taxes. They were not considered subject. The improvements put upon them by the tenant, however, were taxed by the city and are still taxed.

In the spring of 1806 an ordinance was passed which provided for taxing ground-rent lots, but it was reconsidered, referred to a committee, fully discussed, and in the following autumn that part of it was repealed before it was ever put into operation.

Printed Record, p. 50.

In the year 1878 an ordinance was passed taxing the ground-rent lots. No attempt was made to enforce it until 1890. When the levy was made this suit was brought to enjoin it, and the case is here by writ of error to the supreme court of the State of Georgia, which court held that the ground-rent lot was subject to taxation by the city.

After the ordinance of September 28, 1790, was passed it was necessary to draw conveyances. The conveyance of the "conditional estates" in some respects departed from the ordinance and contained language and incorporated terms which are not to be found in the ordinance. Among other interpolations is the following:

"Subject only to such assessments and burthens as shall be in common with other lot-holders in the city."

Printed Record, p. 20.

This language occurs at the end of the paragraph in the conveyance which states that the lot-holder, so long as he pays the ground rent, should have the use and occupation of the premises without let, suit, trouble, eviction, or denial. It is upon these words above quoted that the supreme court of Georgia mainly rested its decision. That court held that they made the property subject to the city taxes.

Bearing in mind that they are not to be found in the ordinance, and that no language of that sort or having any similar meaning is found in the ordinance, and that, so far as we know or can discover, they crept into the deed or conveyance without any authority whatever, it becomes important to inquire whether they possess any legal force.

Counsel for the defendant in error in his brief takes the position that if the ordinance and the deed conflict, the latter controls. This statement is found on page (1*a*) under subdivision (*b*). The same idea is repeated elsewhere, in the same brief. We respectfully submit that the law is just the opposite. It is familiar law that an act of a legislative body, such as Congress or a State legislature or a city council, disposing of any part of the public domain, must be

strictly followed. When Congress or a State legislature or the legislative body of a municipality passes an act or ordinance, as the case may be, making disposition of land which is the property of the United States or the State or the municipality, no departure from the terms or limitations of the act or ordinance can lawfully be made. The deed or lease, or whatever other form of conveyance may be used, is the work of a mere scrivener. It must conform to the act or ordinance which authorizes it to be made. He cannot make a new and different bargain. The ordinance must control the terms of the conveyance. He can neither leave out conditions which are contained in the ordinance nor insert conditions which are not contained in the ordinance.

It would not be in the power of every member of Congress to change the terms of an act disposing of any of the public lands except by another act amending or repealing it, lawfully passed. This court has several times announced the principle which we have above stated in unmistakable terms.

Irvine *vs.* Marshall, 20 Howard, 558, 566, 567.
McGarrahan *vs.* Mining Co., 96 U. S., 316–321.
U. S. *vs.* Iron Silver Mining Co., 128 U. S., 673–680.

In the case of Irvine *vs.* Marshall the principle is distinctly announced that neither the practice of the Land Office of the National Government nor the action of a State government could give any validity to a departure in a patent from the terms of the act authorizing the sale.

In the McGarrahan case the court declared that the terms of the act disposing of the land were "mandatory."

In the U. S. *vs.* Iron Silver Mining Co., the variance between the contract and the act of Congress was in adding language not found in the act of Congress, in the statements concerning lodes and veins, in locating placer mines. The court held the addition void.

In the case mentioned on page 12 of the brief of the defendant in error the "instrument" referred to by the Chief Justice was the act of the Rhode Island legislature.

Providence *vs.* Billings, 4 Peters, 561, 562.

The claim is now made for the first time, so far as we know, that when by act of Congress, a State legislature, or city council, public land is disposed of, it is in the power of those who draw the conveyance to change the contract and dispose of the land upon terms different from those fixed by the act or ordinance.

But for a hundred years, nearly, these words thus interpolated in the conveyance have been held to mean that the lot-holder must pay the State and county taxes and city taxes on the improvements, and that the city cannot tax the land. It is now contended that the lot-holders are estopped to say that these words thus interpolated are unauthorized by the ordinance, and therefore they are not bound to pay the State and county taxes. It is said that they have acquiesced in that construction too long to raise the question now. True. But the estoppel must be mutual. If the lot-holder is estopped to say that he is not liable for State and county taxes, the city is estopped to say that the lot is liable for city taxes.

Both parties for nearly a hundred years have agreed that

the lots were subject to State and county taxes, but were not subject to city taxes.

Printed Record, pp. 50, 51.

If we are correct in our statement of the law, that an interpolation in the conveyance of language changing the terms of the contract, as set forth in the ordinance, is void, then the words added to the conveyance possess no force, except such as is derived from the conduct of the parties. The only claim to respect which they can have in a court grows out of the fact that the parties have dealt with the subject in a certain way so long that they will not now be permitted to say that it means anything different from what that conduct has imported into it. This being true, all that they did must be considered. Their conduct on both sides towards the contract must be given due weight. All that they have agreed to by conduct must stand, or all must fall. It will not do to say that the lot-holder has agreed for a hundred years that he is bound for State and county taxes, and therefore he must remain bound, and at the same time to say that although the city has agreed for a hundred years that she cannot tax this land, nevertheless she can tax it. If these words were mere void surplusage when they were first written into that conveyance and are only binding because the parties have acted under them, then we do not look to the language itself alone for their meaning—but they mean what the conduct for a hundred years of both parties has made them mean. Neither one of the parties will be heard to say that a new rule can now be made.

This case was tried in both State courts upon a misapprehension. Counsel for the defendant in error in his

brief in this court is laboring under a misapprehension. The contention of the plaintiff in error has all the way through been misapprehended. It is not contended now, and never has been contended by the plaintiffs in error, that there is any contract, upon which they rely, which exempts from taxation any property which is subject to taxation. The contention of the plaintiffs in error is that the contract of September 28, 1790, between the city and the ground-rent lot-holders kept the lots from being subject to city taxes. That contract did not make them subject, and they were not subject before. A mere lease was made by that ordinance. No title passed. The contract kept them out of the class of subjects liable to city taxes. It never was in the power of the city to tax them, because the title remained in itself. It must be borne in mind that the lessor in this case was and is also the taxing power. If the lots are taxed by the city, the tax goes into the same pocket as the rent. The lessor collects its rent as landlord for the use of its property, and then proposes at the same time to tax its tenant on the same property as the tenant's property. No one can collect rent except on his own land, and no power can levy taxes on its own property. When the city collects rent the law says the property must belong to the city, or rent cannot be due. When the city collects taxes the law says the property cannot belong to the city, for the city cannot tax its own. When such a lessor has leased its property under such a contract as that of 1790, and when in the same contract it has covenanted with its tenant that the use and occupation of the premises are forever secured to him on payment of the ground rent, a subsequent ordinance taxing that property impairs the obligation

of that contract. That is the contention of the plaintiffs in error.

The city leased this property and covenanted that the use and occupation should be secured upon the payment of grount rent. For a hundred years it kept faith with its tenant. Any attempt now to exact any more money out of him by ordinance, under any name or in any guise, impairs the obligation of the contract.

The supreme court of Georgia in the case referred to by the counsel for the defendant, the case of Laurence *vs.* The Mayor, 71 Ga., 392, took what seems to us to have been an entirely correct view of the relations of these parties. It is a great mistake to suppose that upon a resale of one of these ground-rent lots the city collected the purchase-money or bid. It only collected the balance of rent due. An examination of the Laurence case will show clearly that the supreme court in that case so held. No one can doubt that this is correct who will read the fourth section of the ordinance of September 28, 1790. It is conclusive that it was a lease and not a sale which was entered into between the parties. If it had been a sale the balance of purchase-money would have been collected; as it was a lease, the balance of rent was collected.

The provisions with regard to subdivisions and with regard to transfers of leases point clearly to the relation of landlord and tenant and not that of vendor and vendee.

Record, pp. 34, 36, 37.

Of course, if the "lessee," as the ordinance on page 34 of the record calls him, was a purchaser and owner, he could divide his own lot without going back to the city.

In like manner, if he was a purchaser, a mere endorsement of transfer such as are found on pages 36 and 37 would not operate to pass a title from him or to convey any interest or ownership.

In 1787 the legislature of Georgia passed an act relating to the city of Savannah, section 5 of which is in these words:

"*And be it further enacted, etc.*, That the wardens to be chosen under this act, or majority of them, are hereby vested with full power and authority to let, lease, or rent, at public sale, any lot or lots of land, including the lot of land containing sixteen acres called the Spring, westward of said town of Savannah, and the building commonly called the Vendue house, and the monies arising therefrom shall be applied by the said board of wardens to the correcting this act into execution."

Watkins' Digest, pp. 354, 355.

It was by authority of this act that the ordinance of September 28, 1790, was passed.

The eleventh section of this act of 1787 repealed the old colonial act of 1760.

Watkins' Digest, p. 355.

It appears, therefore, that the act of 1823, which ratified the sales, was unnecessary.

We submit that due weight is not given by counsel for the defendant in his brief to the notice of sale published by the commissioners. For the terms of this notice see—

Printed Record, p. 30.

Counsel has failed to observe that this was a notice given to the public by commissioners appointed under section 7 of the ordinance. It was an official act. The same is true of the reports of the mayors and marshals. It is no more legal for a city to entrap people by such declarations than it is for any other person to do so.

But independently of these acts of the officers, the ordinances passed from 1790 to 1878 are the acts which estop the city. It never has been doubted that legislative action will estop any government, whatever may be said of the other departments.

It is objected by the defendant in error that this court is without jurisdiction because there is no Federal question in this case.

The language in the petition which, we think, makes a Federal question is this:

"Your petitioners further show that the ordinance passed by the said mayor and aldermen imposing a tax upon said ground-rent lots, impairs the obligation of the contract made by the said mayor and aldermen under the ordinance and conveyance when said lots were originally disposed of by the said mayor and aldermen, and that said ordinance is unconstitutional, illegal and void."

Printed Record, p. 6.

We respectfully submit that this language directs attention to the tenth section of the first article of the Constitution of the United States so plainly as to leave no doubt about what is meant, upon the mind of any well-informed person.

Such language has often been held sufficient.

Water Power Co. *vs.* The Street R. Co., 172 U. S., 485.
Bridge Prop. *vs.* Hoboken, 1 Wall., 142, 143.
Spencer *vs.* Merchant, 125 U. S., 352.

Of the cases cited in the brief for the defendant in error, Oxley Stave Co. *vs.* Butler had only two issues in it in the State court: First, were the subscriptions to stock authorized by law? And, second, was there fraud in the decree?

Kipley *vs.* Illinois contained nothing which directed attention to any constitutional provision.

Butler *vs.* Gage was an attempt to raise the Federal question after argument, re-argument, and final decree in a State court.

New Orleans *vs.* Water Works went off upon rules of general jurisprudence.

As stated in the first brief for the plaintiffs in error, the ordinance levying this tax is an authority exercised under the State of Georgia, and if repugnant to the constitution is subject to the same fate as an act of the legislature would be.

Ex parte Virginia, 100 U. S., 339.
Neal *vs.* Delaware, 103 U. S., 370.
Yick Wo *vs.* Hopkins, 118 U. S., 432.

Discovery having been waived, the answer of the defendant in this case is not evidence, although sworn to. It is mere pleading.

Code of Georgia 1895, par. 4962.

But an admission in such an answer is evidence for the plaintiff.

Code of Georgia 1895, par. 5056.

The defendant's answer admits the succession of plaintiffs as lessees.

Printed Record, p. 14.

Respectfully submitted.

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